

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JARED YOUNG

Claimant

VS.

KANSAS NEUROLOGICAL INSTITUTE

Respondent

AND

STATE SELF INSURANCE FUND

Insurance Carrier

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Docket No. 186,308

ORDER

ON the 31st day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge James R. Ward, dated February 23, 1994, came on for oral argument.

APPEARANCES

The claimant appeared in person, pro se. The respondent and State Self Insurance Fund appeared by and through their attorney, Scott M. Gates, of Topeka, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board included the transcript of the preliminary hearing of February 21, 1994, and exhibits introduced at that hearing together with the pleadings filed of record in this case.

ISSUES

The disputed issues raised by respondent are whether notice was timely given and whether the injury arose out and in the course of the employee's employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board has jurisdiction pursuant to K.S.A. 44-551 and K.S.A. 44-534a to consider this appeal from a preliminary order. Respondent has asserted that claimant failed to prove by a preponderance of the credible evidence that claimant gave timely notice of injury as required by K.S.A. 44-520 and that claimant suffered accidental injury arising out of and in the course of his employment. These issues are both specifically enumerated in K.S.A. 44-534a as among those disputed issues which are to be considered jurisdictional and subject to review by the Appeals Board.

After consideration of the arguments made and review of the evidence presented, the Appeals Board finds for purposes of preliminary hearing that claimant has failed in his burden of proving timely notice having been given pursuant to K.S.A. 44-520. In so finding, the Appeals Board need not make a finding as to the second issue raised, that is whether claimant suffered an accidental injury arising out of and in the course of his employment.

K.S.A. 44-520 provides:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and the particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided by this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

Claim for compensation is being made for a hernia which is alleged to have been suffered by accidental injury at work on August 11, 1993. Claimant was aware of a knot in his stomach but was not aware that this was the result of a hernia until he was examined by his personal physician. The date of this examination is not contained in the record. He was referred to a surgeon and surgery was scheduled to be performed on September 21, 1993.

Claimant last worked on September 18, 1993. He informed his supervisor that he needed time off for surgery and requested a leave form for this purpose. He did not advise his supervisor at this time as to the nature of the surgery nor that it was for a condition resulting from a work related injury. The first indication the employer was given of an alleged work related injury was on October 13, 1993 when claimant telephoned the personnel department nurse, Diane Waggoner to request an injury report form. During this conversation claimant related having stomach pain approximately two weeks prior to receiving treatment but did not relate any specific injury having occurred at work nor was any specific accident date given.

The "Report of Employee Injury" form was returned to the employer on November 23, 1993. Again no specific date of accident was given. In response to the question on the report form as to the date of accident, the claimant answered that he did not know. On January 7, 1994 a claim for workers compensation was received by the State Self Insurance Fund showing a date of accident of "about Aug.'93". A letter addressed to KNI by the claimant and stamped received by the State Self Insurance Fund on January 18, 1994 was the first notice of a specific date of accident and was the first time the August 11, 1993 accident date was given.

The St. Francis Hospital records from the September 21, 1993 admission for hernia surgery were admitted into evidence. The history contained in those records describes an umbilical hernia having been present for at least several weeks. There is no mention of an accident nor of the injury being work related. The hospital charges for this admission were billed to the claimant's private health insurance carrier.

There is no dispute but that notice of injury was not given to the employer within ten days after the date of accident. There is no allegation that the employer had actual knowledge of an accident, that the employer was unavailable to receive such notice or that the employee was physically unable to give such notice. Accordingly, the question becomes whether claimant has shown that his failure to provide timely notice to his employer was due to just cause and, if so, whether the required notice was given within 75 days after the date of accident.

The testimony of claimant to the effect that he was unaware of the precise nature of his injury and that it was work related until after the knot in his stomach was diagnosed as a hernia by his physician may justify notice being given to the employer beyond ten days after the date of accident. However, even after that diagnosis had been made claimant did not give notice of the accident until October 13, 1993, some 64 days after the date the accident is alleged to have occurred. There is no explanation given as to why the claimant did not advise his supervisor when requesting time off for the surgery that his condition was work related. Claimant's supervisor, Paul Warfield, testified that claimant never reported a reason for the stomach hernia, that he had never complained about his stomach prior to the day he requested leave, and that he was not made aware of any accident or injury having occurred on August 11 or any other date from which claimant is alleged to have suffered the hernia. It was well beyond 75 days after the alleged date of accident before the "time and place and particulars" of the accident were given to the employer.

In proceedings pursuant to the Workers Compensation Act, the burden of proof is on the claimant to establish his right to compensation and to prove the various conditions on which the claimant's right depends. K.S.A. 44-501(a) "Burden of proof" is the burden a party has to persuade the trier of fact by a preponderance of the credible evidence that

such party's position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-501(g). The Appeals Board finds that claimant did not give timely notice of injury and that claimant has failed in his burden to establish that his failure to timely notify his employer of the accident as required by K.S.A. 44-520 was due to just cause.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that, for preliminary hearing purposes, the order of Administrative Law Judge James R. Ward dated February 23, 1994 is reversed; that claimant's alleged accident of August 11, 1993 is not compensable under the Kansas Workers Compensation Act due to the lack of timely notice; and that this proceeding be and hereby is remanded to the Administrative Law Judge for such additional proceedings herein as the parties may require.

IT IS SO ORDERED.

Dated this _____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Jared Young, Claimant, 3139 Michigan, Topeka, Kansas 66605
Scott M. Gates, Attorney for Respondent, 900 SW Jackson, Room 107, Topeka,
KS 66612-1214
James R. Ward, Administrative Law Judge